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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 236

JOHN C. ARP AND MILDRED K. ARP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District Court (Pet. App. 14–30) is reported at 141 F. Supp. 300. The opinion of the Court of Appeals (Pet. App. 31–38) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1957. The petition for a writ of certiorari was filed June 28, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the District Court properly sustained proceedings to condemn, at the request of the Acting Commissioner of the Public Housing Administration,

fee simple title of lands upon which a housing project had been constructed under condemnation of the right to use such lands from year to year.

STATUTE INVOLVED

Section 605 (a) of the Act of October 14, 1940, 54 Stat. 1125, as amended (the "Lanham Act"), 42 U. S. C. 1585 (a), provides as follows:

> The Administrator may continue by lease or condemnation any interest less than a fee simple in lands heretofore acquired by the Administrator for national defense or war housing or for veterans' housing (whether of permanent or temporary character), or held by any Federal agency in connection therewith, and may acquire, by purchase or condemnation, a fee simple title to or lesser interest in any such lands if the Administrator determines that the acquisition of such fee simple or lesser interest is necessary to protect the Government's investment or to maintain the improvements constructed thereon, or that the cost of fulfilling the Government's obligation to restore the property to its original condition would equal or exceed the cost of acquiring the title thereto.

STATEMENT

Under the provisions of the Lanham Act of October 14, 1940, 54 Stat. 1125, as amended, 42 U. S. C. 1521 *et seq.*, the Government condemned for housing purposes the leasehold interest in certain lands located in Cheyenne, Wyoming, in October 1943 (R. 7–9). The estate taken was renewable from year to year for the duration of the emergency plus a three-year period

the termination of the term (R. 10–11). A nominal rental was stipulated to by the parties (R. 11–15). The Government thereafter entered into possession of the lands and a housing project was constructed. It has been maintained thereon to the present time.

Petitioners Arp purchased this land as part of a larger tract from the former owners in 1952 (R. 220). The war emergency was officially terminated by Congress, after numerous extensions, in July 1953. The Government's leasehold interest would, therefore, have expired in July 1956 unless suitable arrangements for renewal could be made. In May 1955, however, a motion to terminate the condemnation (R. 16) was filed by the Arps. This motion alleged that the Government and the owners "do not agree as to fair value of the property" (R. 16). No action was taken on said motion at that time but negotiations with the landowners were commenced with a view of disposing of the improvements to them at a fair price. These proved fruitless.

In August 1955 a complaint in condemnation was filed in the same case (R. 19)[1] under the authority of the Lanham Act upon a determination by the Acting Public Housing Commissioner that "the acquisition of a fee simple title in and to said lands is necessary to continue in use the housing constructed on said lands in the orderly demobilization of the war effort, to maintain the improvements constructed thereon, and to protect the investment of the United States in said

[1] While not so designated, this will be treated as a supplemental complaint since it is filed in the same case.

improvements" (R. 20). A declaration of taking was filed and the estimated compensation deposited in the registry of the court (R. 17–19).

Petitioners, in an amended separate answer, alleged certain affirmative defenses to the taking of their land (R. 21–29). A motion to strike these defenses was filed by the Government (R. 29–30) and sustained by the court (R. 35), which filed an opinion stating its reasons in detail (Pet. 24–30). The court at this time also overruled petitioners' motion to terminate the condemnation (*supra*, p. 4). Thereafter, in August 1955, a jury trial to determine just compensation for the taking was had, resulting in a verdict of $75,000 for the fee taking of the lands comprising 30.89 acres (R. 37). A motion for new trial was timely filed (R. 38) alleging as error, among other things, the trial court's action in striking petitioners' amended separate answer, and the filing, by the Government, of its supplemental complaint in condemnation and the supplemental declaration of taking in August 1955, without leave of court as required by Rule 15 (d), Federal Rules of Civil Procedure. The motion was denied (R. 48). The Court of Appeals affirmed unanimously (Pet. App. 31–38).

ARGUMENT

1. The statute is explicit in empowering the Administrator to procure fee title to land occupied by temporary wartime housing projects. The Administrator has determined that this is necessary for the purposes stated in the statute which include protection of the Government's investment. Petitioners assert

that the United States cannot take fee title "in order to recoup for the treasure [sic] costs of the United States in initiating the defense housing project in the year 1943." But such considerations would authorize the taking of fee title of the site of a temporary housing project in the first instance. *Lewis* v. *United States*, 200 F. 2d 183, 185 (C. A. 9), certiorari denied, 345 U. S. 907, and cases there cited. The same factors justify Congress in authorizing the taking of fee title to lands upon which projects have been constructed. *Old Dominion Land Co.* v. *United States*, 269 U. S. 55. And an attack upon the wisdom of the administrative decision so to proceed in this case does not present a justiciable issue. *Berman* v. *Parker*, 348 U. S. 26, 35–36.

2. The attempt (Pet. 10–12) to preclude condemnation of fee title because of the previous condemnation of temporary use is based on the false assumption that the earlier judgment forbade condemnation of fee title. It did not purport to nor did it seek to deprive the United States of its right to acquire greater rights in property to which it already had some interest. *United States* v. *6.74 Acres of Land*, 148 F. 2d 618, 620 (C. A. 5). Not even Congress can surrender the power to condemn. *United States* v. *Village of Highland Falls*, 154 F. 2d 224 (C. A. 2), certiorari denied, 328 U. S. 720.

3. The objection that the supplemental complaint failed to state a claim upon which relief can be granted (Pet. 11–12) is simply another form of the erroneous assertion that the United States is precluded from condemning the fee because it had pre-

viously condemned temporary use. Since, as the court below noted (Pet. App. 35a), a separate proceeding could have been brought, it was not an abuse of discretion to allow the filing of a supplemental complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1957.